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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1254

ROANOKE IRON & BRIDGE WORKS, INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT ORDER OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Roanoke Iron & Bridge Works, Inc., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled case on December 27, 1967.

OPINIONS BELOW

The decision and order of the National Labor Relations Board, printed in Appendix B hereto, Page 15, is reported in 160 NLRB 17. The opinion of the Circuit Court of Appeals, printed in Appendix C hereto, Page 36, is reported in _____Fed 2d_____.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

1. Is an employer required to agree to a union dues collection clause in a contract, when he has good faith intentions to reach and does reach agreement on all other matters, if he is aware that a refusal of a check-off may weaken the union?

2. When an Employer and Union have bargained and have signed a contract, is it lawful for the Board to consider one bargaining issue in isolation, and to require that the party who proposed or objected to the item give a sound business or union reason for doing so?

STATUTE INVOLVED

The statutory provision involved is Section 8(a) (5) of the National Labor Relations Act [29 U.S.C. Section 158].

STATEMENT

Shortly after the Steelworkers Union won an election at the Company's plant in Roanoke, Virginia, in October, 1964, the parties began bargaining. Thirteen meetings were held before March of 1965, when the Union called a strike. At that time eight items were still in dispute, including wages and a check-off of Union dues. Twelve more meetings were held, and by October, 1965, all issues were settled except wages and check-off. On October 29, 1965, the Union withdrew its check-off demand and within an hour, the parties had settled the wage issue and agreed on a contract.

Throughout the negotiations, the Company had declined to collect the Union's dues on the grounds that this was a Union matter; that the Union fixed the amount of dues, eligibility requirements, time of payment, and determined how the dues were to be spent; and that as a matter of principle the Company had no obligation nor desire to become involved in what was entirely a Union problem. There was never any refusal to discuss the question. In fact, it came up at nearly every session; and until the final meeting, the Union insisted on a check-off in the contract; and the Company repeated its objection to collecting the Union's dues.

The Union asked if the Company could not afford the check-off or if the bookkeeping were too burdensome. The Company said it was not these considerations; it simply felt no obligation to assume a responsibility which is solely a Union problem.

The Company had signed a contract with the same Union in 1951 without a check-off, and the Union did not renew the agreement. In 1961, an independent Union won an election in the plant, and this time the Company agreed to collect the dues, provided it maintained some control over the funds. This Union also lasted only a year.

In the 1964 Steelworkers election campaign, the Company told its employees that the Union had not renewed its 1951 contract because the Company would not collect its dues; it stated that when the employees found they did not need a Union, they stopped paying dues; and the Union pulled out and left.

During the 1964-1965 bargaining, the Company reminded the Union that the Steelworkers had signed other contracts without a check-off, one right in Roanoke. The Union President stated that half of his members would pay dues without a check-off, but it would be troublesome for the Union to have to collect its own dues.

Neither party ever said it would never change its position, but neither did so until the final meeting when the contract was settled.

The matter came to an NLRB hearing on the Union's charge of bad faith bargaining on the check-off. In a split decision, Board members McCulloch, Fanning and Zagoria adopted the Trial Examiner's ruling against the Company; and members Brown and Jenkins dissented.

The Trial Examiner and the Board rejected the Union's claim that the Company had tried to forestall agreement by its refusal of the check-off. The Trial Examiner further ruled, and the Board agreed, that an employer can grant a check-off to one Union and deny it to another; and that the Com-

pany's expressions of opposition to the check-off before the negotiation did not prove bad faith.

However, the Trial Examiner found that the Company believed that "if it refused the check-off, the Union would suffer and probably again leave the scene." This, coupled with his finding that the Company did not refuse the check-off for reasons of expense or inconvenience, resulted in bad faith. His conclusion was that "to bargain in good faith, the bargainer must advance his contentions and reject the other party's contentions (when he does) for legitimate reasons of self-interest, and out of what appear to him to be sound considerations of business (or Union) judgment." He stated also, "The employer's motives and objectives must be legitimate." These legal conclusions were adopted by three Board members, who ordered the Company to bargain in good faith on the check-off. The Trial Examiner's Decision is printed in Appendix B, Page 15; and the Board's Decision and Order is printed in Appendix B, Page 33.

The two dissenting Board members found that the Company was willing to bargain and did so; that it made counter proposals and signed a contract on all matters agreed upon. They declared that the record did not support a conclusion of bad faith. Their dissent is printed in Appendix B, Page 34.

The Company asked for review by the Court of Appeals for the Fourth Circuit, but the Union earlier sought review by the District of Columbia Court of Appeals for the Board's failure to issue an outright order to the Company to grant a check-off; and the case was heard by the first Court petitioned.

In the Court of Appeals, there was another split decision, with Judges Leventhal and Robinson affirming the Board's order, and Judge Burger writing a lengthy dissent.

The majority opinion declared that the check-off is a subject of mandatory bargaining; but the Company took its position to weaken the Union. The Court then declared that under the Supreme Court's rule in NLRB v. Truitt Manufacturing Company, the parties must bargain in hope of reaching agreement, but that under the rule of NLRB v. Katz, a party may not try to frustrate agreement on one issue, even if willing to reach an overall agreement. The Court's opinion is printed in Appendix C, Page 38.

Judge Burger, dissenting, said the Company's knowledge that the absence of a check-off will cause extra expense and work for the Union does not distinguish this case from the normal economic pressures of collective bargaining, any more than a strike called by a Union to harm an employer. He rejected the majority's reliance on the Katz case, saying rather that Katz prohibits refusal to bargain on one subject while willing to reach agreement on others; not refusal to reach agreement on one subject while willing to agree on others.

Finally, Judge Burger declared that this case establishes the premise that the motives of the parties on each issue in bargaining must now be studied to determine if such motive is based on sound business judgment. He stated that the Board and Unions generally may regret the day when component parts of bargained issues are considered in isolation. His dissent is printed in Appendix C, Page 50.

REASONS FOR GRANTING THE WRIT

1. The practical effect of the decision below is to remove the check-off as a bargaining issue.

The immediate practical effect of the Board's decision, upheld by the Court below, is to remove the check-off from any future bargaining by any Company as a bargaining issue. Any employer knows that a Union with dues collected by payroll withholding is stronger financially than a Union which relies on voluntary payments from its members. If the employer does not know this, it is a simple matter for the Union, at its first bargaining session, to declare that the Union cannot sustain itself by voluntary dues payments, and will be hopelessly weakened if the Company does not collect the dues. Thereafter, such knowledge would inevitably be confused with intent, and would then become a motive to weaken the Union. In the absence of some objection advanced by the employer which would satisfy the Board as a sound business reason, the employer would be in bad faith.

Further, there is uncertainty as to where in the bargaining sequence the bad faith might occur. An employer might be willing to grant a check-off but might want to trade it for other concessions. Does his initial refusal, unaccompanied by reasons which, in the language of the Board, "advance his own economic interest or safeguard the rights of his employees," constitute bad faith at that time and thereby remove from the area of mandatory bargaining one strong employer bargaining item?

The same argument would apply to an impasse on Union security. A Union might claim at the bargaining table that it could not survive without a maintenance-of-membership clause. The Company might be opposed to such a clause

of forced membership as a matter of principle, but in the absence of a showing of harm to the Company, the employer could not maintain his position in good faith.

2. The Court below has attempted to expand this Court's decision in NLRB v. Katz far beyond the Katz facts and theory.

This Court stated in Katz that a party may not refuse to bargain (by taking unilateral action) on a single mandatory bargaining issue, even with a good-faith desire to reach an overall agreement.

In the Roanoke case, the employer exhibited the good-faith desire for an overall agreement and actually reached agreement. On the single mandatory bargaining issue, he bargained at length and with full discussion (unlike the employer in Katz) but his long-range, post bargaining purpose was unacceptable to the Board and the Court of Appeals; so the Katz doctrine is enlarged to include a study of motive as well as whether the single issue was bargained.

3. The question which this Court is requested to review is of great importance to the Board's administration of the law, since the Board now will consider individual motives and must weigh the soundness and logic of the bargainer's positions.

Until now, motives of the bargaining parties have been scrutinized only as to their effect upon the bargaining processes; i.e., taking a position to frustrate bargaining or to prevent final agreement. If a party has advanced or rejected a proposal on a subject of mandatory bargaining, and has explained his position to the other party, neither the Board nor the Courts have been concerned with motives or long-range results.

In the Roanoke case the Board specifically found that the employer did not use his check-off position to frustrate bargaining. However, the motive and possible results which may come into being long after the contract is signed, become the test of good faith bargaining, in the new reasoning of the Board.

Unexplained motives are, at best, difficult to prove; and when the prober is called on to distinguish actual motive in a positive sense, as by insisting on a contract provision to weaken the adversary, from simple knowledge of a probable result of refusing a proposal, then the tests of good faith bargaining become complicated in the extreme.

Aside from motive, the soundness and the logic of bargaining proposals has never been considered as a test of good faith negotiations. The national policy of collective bargaining has left it to the parties to dissect, undermine or explain away the proposals of the other, and when argument fails, to refuse an objectionable proposal. For the Courts to test good faith by judging the substantive terms of contract proposals would seriously undermine the whole bargaining process. As one Court of Appeals has said: "The parties may have either good or bad reasons or no reasons at all, for insistence on the inclusion or exclusion of a proposed contract term." In the Roanoke case, the Board declares and the Court of Appeals agrees that the bargaining must be examined to determine whether each idea is based on sound or sensible premises. The Board says: "To bargain in good faith the bargainer must advance his contentions and reject the other party's contentions (when he does) for legitimate reasons of self-interest, and out of what appears to him to be sound consideration of business or Union judgment."

Petitioner believes that this new doctrine will lead to a host of charges by parties who have been unsuccessful at the bargaining table, and now want the Board to examine the soundness of their adversaries' proposals.

4. Unions and employers alike will be greatly restricted in long-established bargaining techniques.

The Roanoke case was directed against an employer; but as Judge Burger stated in his dissent, the Roanoke case applies to both sides of the bargaining table and offers a real threat to the bargaining rights of Unions. A holding that the duty to bargain means that a party is compelled to agree unless it offers a solid reason for not doing so, challenges the freedom of Employer and Union in collective bargaining.

A fairly common Union practice, particularly in seasonal industries, is to delay and maneuver the bargaining, or even make an outright demand that the contract expire during the employer's peak season. This is simply a strategic device to provide that bargaining for a new contract will occur when the employer is weakest and most vulnerable to a strike. The Union has no purpose other than to weaken the other party in a future bargaining position.

Does this now become unlawful if the Union cannot offer a "sound business or Union reason" for its adversary-weakening purpose? Can the employer demand that the Board pass on the Union's reasons?

The fact that the absence of a check-off will weaken the Union and the employer knows it, but does not give reasons acceptable to the Board, is said to be unlawful. Will this ruling subject the Unions to the same test when they employ economic pressure to weaken an employer?

The importance of this case is emphasized in the Labor Relations Reporter of the Bureau of National Affairs, a labor relations publisher, when it wrote a special analysis of the lower Court's decision on February 12, 1968. BNA says:

"The decision adds a new exception to the general rule on agreeing to a proposal or making a concession. There will be a violation of the good faith bargaining duty if the refusal to agree to a proposal within the area of mandatory bargaining is not based on a satisfactory business reason, but is for the purpose of weakening or destroying the other party. In the view of the dissent, the holding contains the seeds of danger for both Employers and Unions, since the premise is that the motive for a bargaining stance on each issue must be a sound business or Union reason."

Harvard Law Review and other law reviews have already requested copies of the Petitioner's brief in the lower Court in order to write an article on the decision as a new theory in collective bargaining.

CONCLUSION

For the above reasons, the Petitioner believes that this Court should review the decision of the Court of Appeals. The lower Court's extension of the Katz doctrine to require that the Board examine the motives of the parties and the soundness of their arguments opens a vast area of new litigation. The immediate and more limited result is to remove the check-off from mandatory bargaining and to require in effect that an employer support a Union by collecting its dues, or even require maintenance of membership in the

Union without bargaining. The Petitioner believes that each of these results is so great a departure from present law that this Court should review the lower Court's decision to determine whether such changes should be made in the law of collective bargaining.

R. D. Douglas, Jr.
Counsel for Petitioner

APPENDIX A

THE STATUTE INVOLVED

Section 8(a) (5) of the National Labor Relations Act [29 U.S.C. 158(a) (5)] provides:

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title."

Section 8(d) of the National Labor Relations Act [29 U.S.C. 158(d)] provides:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

APPENDIX B
TRIAL EXAMINER'S DECISION AND DECISION AND ORDER OF THE BOARD

TRIAL EXAMINER'S DECISION

Statement of the Case

This case, heard at Roanoke, Virginia, January 6, 1966, pursuant to a charge filed March 16, 1965, and a complaint issued November 2, 1965, presents the narrow and novel issues of whether the Respondent, herein called the Company, failed to bargain in good faith with the Charging Party, herein called the Union, with respect to a provision for facilitating the collection of union dues, and if so, whether an order should issue directing the Company to grant the Union such a provision.

Upon the entire record in the case, and after due consideration of the briefs filed by the parties, I make the following:

Findings of Fact

I. The business of the Company and the labor organization involved

The Company, a Virginia corporation engaged at Roanoke in the fabrication and erection of steel, annually receives at Roanoke goods valued in excess of $50,000 which are shipped to it directly from outside the State, and is therefore engaged in commerce within the meaning of Section 2(6) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The alleged unfair labor practice

A. Background

1. The history of the "checkoff" at the Company

In 1951 and 1952 the Union enjoyed a brief period in which it was the certified bargaining representative of the Company's employees. The Company and the Union at that time engaged in collective-bargaining negotiations for almost one year before reaching agreement. The principal matter which prolonged those negotiations was the Union's demand for, and the Company's refusal to grant, a "voluntary checkoff," i.e. a means under which the union dues of employees so desiring and so designating would be paid by the Company out of their wages directly to the Union. At last the Union yielded to the Company's position on that point, and a contract was executed which contained no provision for "voluntary checkoff." The contract expired after one year, and the Union did not negotiate for a new contract.

In 1961, a union composed solely of Company employees[1] won certification as the bargaining representative, and commenced negotiations for a contract. This organization, the "Steel Fabricators Union of Roanoke, Virginia," also sought a "voluntary checkoff" clause in the contract it was negotiating with the Company. According to the testimony of W. A. Oakey, vice president and general manager of the Company, and one of its negotiators in all the 1951, 1961, and 1964-5 bargaining sessions here referred to, the Company was originally opposed to granting the checkoff in 1961, but ultimately agreed to it, under certain terms described more fully below. In explaining why the Company yielded on the checkoff in 1961, Oakey testified?

> Those boys appealed to us that they had no organization and no bookkeepers or secretary, and no way to

---

[1]Company counsel himself referred to this organization as "the Company Union." In occasionally employing that terminology, I, of course, do not intend to reflect on its status, which appears to have been that of a bona fide labor organization.

keep their records. They said it would be a great help to them if we would do this.

Later he observed on this matter:

We gave it to the local union because they had no going organization. We gave it to them to help them, . . .

Again on cross-examination:

Q. I will ask you if you did not tell us that what you referred to as a company union or words to this effect, that those boys explained that they could not survive without some method of collecting dues. You told us that?

A. Yes.

Q. And you gave some form of checkoff?

A. Yes.

The checkoff clause of the contract to which the Company agreed in 1961 provided, inter alia, as follows:

1. All funds deducted from the pay of any employee for union initiation fees and monthly union dues are at all times under the complete control of regular, full-time employees of the Company.

2. Union representatives responsible for the care, control and disbursement of these funds shall perform such duties in an honest, fair and impartial manner.

* * * * *

5. The Company agrees to deposit once a month, in a local bank selected by the Union, all dues and fees collected during the preceding month. A copy of the bank deposit slip, together with a memorandum showing the source of the funds, will be delivered to the Union as soon as practicable following each deposit. All deposits

made by the Company will be made to the account of "Steel Fabricators Union of Roanoke, Virginia."

6. The Union agrees to give to the Company the names of the employees authorized to sign checks against the account to which the deposits are made. The Union also agrees that the signatures of two (2) full-time employees on each check will be necessary in order for a withdrawal to be made from the account.

7. In order to insure the complete control of the funds at all times by only regular, full-time employees of the Company, the signature cards indicating to the bank the employees authorized to sign checks against the account must be countersigned by an officer of the Company to be valid. The Company will have no further control over the withdrawals or disbursements of Union funds except as stipulated in this Agreement.

Although the checkoff was thus granted, no employees ever had their dues checked off in favor of the "Steel Fabricators Union." By 1964, when the Union here involved again sought recognition, the "Steel Fabricators Union" seems to have disappeared.

2. The Company's 1964 prebargaining statements concerning the checkoff

The Company opposed the Union's efforts to organize in 1964, and in the course of this opposition sent a series of written communications to the employees. Excerpts from these documents, insofar as they bear on the checkoff and union dues, are as follows:

(a) Letter of July 1, 1964:

We know something about this union from our own experience. The Steelworkers Union was voted into this plant some years ago. We bargained with

them, as the law requires, but when they insisted that we take union dues from the paychecks of our employees before our folks even saw their money, we refused to do it. We negotiated with this union for nearly a year before signing a contract. Since we did not accept their dues scheme, this contract was not renewed the following year.

(b) Letter of August 13, 1964:

A little over ten years ago, this same Steelworkers Union put on a campaign just like this one. They made a lot of promises about what they would make us do, and they were voted in as bargaining agent.

The going was pretty rough. We agreed on a few things, but we drew the line at collecting Union dues out of your pay check. For nearly a year we bargained with the Union. Pay raises bogged down, promotions fouled up and for months there was a threat of a strike. Finally, the men began to become impatient to move one way or the other and the Union gave in, and agreed on a contract without a checkoff of dues.

Within a few months, many employees stopped paying the Union any money, when they found out they did not need a Union, and when the contract ran out, the Union pulled out and left us.

(c) Letter of September 1, 1964:

Q. Why is this Union so anxious to get you into the Union, and get a contract here at Roanoke Iron and Bridge?

A. The principal reason is money—your dues. As the Union hires more organizers, somebody has got

to pay their salaries, buy them automobiles, pay their expenses. That is where you come in. They are counting on your dues.

(d) Letter of September 2, 1964:

Q. How much are Union dues? What about fees and assessments?

A. The regular dues are about $5.00 per month, so we hear. Special fees come in all kinds and amounts. Assessments usually come when there is a strike at some other plant, and the strikers need food handouts.

Q. What does the Steelworkers contract say about checking off dues?

A. The contract says: "Unless the Company is otherwise notified, the only dues deducted from the employees' pay will be the regular monthly Union dues."

Q. Does the contract say anything about dues when a man isn't working?

A. Yes. The regular union contract says that if a man is out of work, the company collects all the back dues as soon as his pay check is enough to cover the dues.

Q. If the checkoff ever gets started in a plant, can an employee get out of the union and stop paying?

A. There is some legal question about this. We think a man ought to be able to change his mind and quit paying the Union. The Union people claim

that no man can get out for at least a year, or until the contract runs out.

* * * * *

We feel confident that if our folks think over all the things we have tried to tell you, and if they realize what they have now, and what might come with the Union, they will vote NO on Friday. After all, we had this Union for a year, ten years ago. The employees found out the truth; they quit paying dues; and the Union walked off.

The Union won the election on September 7, 1964, by a vote of 97 to 26, and was certified as the bargaining representative of the company's production and maintenance employees, thereby setting the stage for the bargaining negotiations which in turn gave rise to this litigation.

B. The bargaining over the checkoff

1. Summary of the negotiations

The Company and the Union commenced negotiations in October 1964. After some 12 or 13 meetings between that date and March 9, 1965, the Union called a strike which lasted until the fall of 1965. Meanwhile, bargaining continued during the strike and another 12 or 13 sessions were held. A primary subject of discussion at each of the 25 bargaining sessions, and a primary cause of the strike, was the Union's demand that the contract contain provision for voluntary checkoff or other means of facilitating collection of union dues, and the Company's refusal to grant this demand. The parties finally reached agreement late in October 1965, and the strike ended. Under the agreement the parties executed a contract without any provision for checkoff or other facilitation of dues collection, but agreed that this would be without prejudice to the Union's urging in this

litigation that the Company had violated the Act in allegedly refusing to bargain in good faith on the checkoff.

2. The Union's proposals and the Company's responses

Basically, the Union sought some contractual means of facilitating its collection of dues, and the Company maintained that it was the Union's business, and not the Company's, to collect union dues. In the course of negotiations the Union made several alternative suggestions, to which the Company in turn made responses. These positions may be summarized as follows:

a. The Union asked for a regular voluntary checkoff under which the Company, upon being so authorized by individual employees, would withhold the individual's $5 monthly dues from his wages, and pay that sum to the Union. The Company declined, stating that the Union had won the election by such an overwhelming majority (97 to 26) that it ought to collect its own dues.

b. The Union suggested that at one payday a month the Company make out two paychecks for each employee, one in the amount of $5, which the employee could endorse over to the Union. The Company responded that this would require a good deal of bookkeeping, and that it "just didn't want any part of dues collecting."

c. The Union asked the Company to loan the men $60 for annual dues in advance, and then deduct $5 a month on the loan. The Company viewed this as simply a disguised checkoff, and declined.

d. The Union suggested that the contract be signed and a checkoff insofar as voluntarily authorized go into effect 6 months later. The Company indicated that its opposition to a checkoff would be unchanged 6 months hence. It offered,

however, to sign a contract with a provision for renegotiating matters 6 months hence.

e. The Union asked for a provision under which the shop stewards would have 30 minutes off without loss of pay the day after payday, and would be able to collect dues in the plant during that period. The Company objected to the disruption of work that would be entailed. It offered to let the Union collect dues during lunch periods, a right which the Union asserted (and the Company agreed) the Union had under the statute regardless of contract. The Union asked for facilities in the locker room in cold weather, but the Company declined, agreeing only to the use of the outdoor picnic area or lunchroom during the employees' free time. The Company also offered to let three to five men punch out 30 minutes early and set up a table or a station wagon in the parking lot at which to collect dues.

f. The Union asked that at one payday each month the Company pay the men in cash, but the Company said it did not wish to have that much cash on hand, and also that it would be disruptive to pay by check three times and by cash once each month.

g. On one occasion the Union asked if the Company wanted to "buy the checkoff" apparently implying that if other benefits were sufficiently improved, the Union would abandon its checkoff position. The Company was not interested, and the matter was not pursued. At another meeting, the Union suggested that if some form of union security, such as maintenance of membership, were made available, it could be substituted for the checkoff. The Company expressed hostility to the suggestion, and that matter remained academic as Virginia law precluded union security agreements,

and Section 14(b) of the Act which permits such State laws remained in effect.

3. Arguments and counter arguments presented during the bargaining

The Union urged the Company to grant the checkoff or some other means of facilitating dues collection, pointing out that the employees were scattered over a wide radius around Roanoke, rendering individual collections onerous, that the Company had granted a checkoff to the "Company union" in 1961, that the Company made deductions from pay for employee contributions to the United Fund, that a checkoff would contribute to the stability of the local union, and that the union negotiators were aware that under their previous contract with the Company, which had not contained a checkoff, the Union had not survived.

The Company told the Union that as the Union won the election by a wide margin (97 to 26) it should collect its own dues, and that dues collection was the Union's job, not the Company's. The Company did not take the position that granting the checkoff would be inconvenient or too expensive. The Company explained that it gave the checkoff in 1961 to the "Company union" because that union represented that it could not exist without the checkoff. The Company asked the Union if it felt it could not exist unless it had a checkoff provision, and the Union negotiators responded that it would be difficult but they hoped that this time they could exist without it. One of the negotiators told the Company that at least half of the men would pay their dues without a checkoff. The Company repeatedly expressed the hope that the Union would sign a contract without a checkoff, calling the Union's attention to the existence of such contracts between the Union and other employers. To this the

Union replied that the Company was not aware of the conditions attending agreement at the other plants in question, and at the hearing the Union explained that those employers had accepted one or another of the alternatives which the Union offered this Company. At the hearing the Company explained that it deducted from wages for contributions to the United Fund, the leading local charity, because if contributions were not collected in that manner, the United Fund would be able to collect only a small percentage of what was pledged. The Company further explained that while the Union said it would have a similar difficulty collecting dues, the Union men, unlike the United Fund authorities, saw the employees every day.

C. Concluding findings

All parties are in agreement that the checkoff is a "bargainable" matter, i.e., a term or condition of employment as to which the parties must bargain in good faith, but may bargain to an impasse. The parties did indeed reach an impasse here; the contention of the General Counsel and the Union is that the Company did not bargain about the issue in good faith.

The complaint alleges that the Company "negotiated with the Union in bad faith and with no intention of entering into a final or binding collective bargaining agreement" by "adamantly rejecting" the checkoff (emphasis supplied). Taken literally, this allegation cannot be sustained, for the Company did enter into a final and binding agreement once the checkoff issue was removed. It cannot be said, therefore, that the Company used the checkoff issue as a means of, and for the purpose of, frustrating the negotiations. On the contrary, the Company bargained in good faith on other matters, and did not use its position on the checkoff for the purpose

of avoiding a contract. Notwithstanding the portion of the complaint underscored above, however, this case was fully litigated on the question whether the Company bargained on the checkoff in good faith, and that issue, having been fully litigated and being fairly embraced within the "bad faith" allegation of the complaint (the seven words immediately preceding the passage underscored above), I deem it ripe for decision here.

The fact that the Union eventually accepted a contract without a checkoff provision is, of course, not determinative of the question whether the Company bargained in good faith over the matter, particularly as the issue was expressly reserved for this litigation. Likewise not determinative is the fact that the Company was avowedly hostile to the checkoff even before bargaining commenced. The statute commands neither more nor less than good faith negotiation; it does not require agreement, and it does not require that the parties approach the bargaining issues in a spirit of neutrality. The Company's hostility to, opposition to, or strong reluctance to grant, the checkoff do not of themselves establish refusal to bargain in good faith.

No other single factor taken in isolation goes any farther than the Company's avowed hostility to the checkoff in establishing the presence or absence of good faith. The fact that the Company expressed itself prior to the commencement of negotiations as opposed to a checkoff does not establish that it was in bad faith. This is not a case in which the employer expressed prior to negotiations a fixed determination and an unwillingness to negotiate on a subject of bargaining. The fact that the Company granted a checkoff to the "company union" in 1961 is likewise not dispositive, for it cannot be that once an employer has granted a benefit to

one union he must in subsequent negotiations grant the same benefit to other unions. Finally, the fact that the Company "checks off" for charitable contributions does not require a finding that it was in bad faith when it declined to grant the Union a dues checkoff.

To state that none of these items standing alone establishes a violation of the bargaining obligation does not, however, dispose of the case. Where the issue is whether the employer has bargained in good faith the matter must be resolved by viewing the conduct as a whole, rather than in its several, separated aspects. Cases holding that an employer has been "shadow boxing," "going through the motions of collective bargaining," engaging in "surface bargaining," or "giving the Union a runaround," to quote a few of the phrases courts have employed, necessarily turn on the entire context and not on any single specific action attending the bargaining. The rule is no different in analyzing whether as to one subject of bargaining the parties bargained in good faith. No conclusion of bad faith can be drawn from the failure to reach agreement, but the avowed attitudes of the parties may shed light on whether they were negotiating in good faith. In the case of a single provision, even more clearly than in the case of an entire contract, either party may insist on his position without making a concession, and yet be in good faith. If an employer is in fact opposed in good faith to a lawful union security clause or if a union is in fact opposed in good faith to a no-strike provision, they may maintain their respective positions to the end without violating the Act. One way of ascertaining that such positions are not taken in good faith is to find that they were resorted to and utilized for the purpose of frustrating agreement. If an employer or a union avows a position and the facts establish

that the position was taken because the party adopting knew it would frustrate negotiations, and for no other reason, a finding of bad faith bargaining would follow. But, as already indicated, this is not the case here; the Company did not use its position on checkoffs to prevent reaching a contract.

But frustrating negotiations is not the only key to finding of bad faith. This can be clearly perceived if we realize that "bad faith" has as its necessary antithesis "good faith." To bargain in good faith, the bargainer must advance his contentions and reject the other party's contentions (when he does) for legitimate reasons of self-interest, and out of what appear to him to be sound considerations of business (or union) judgment. For example, in Bausch & Lomb Optical Co., 108 NLRB 1555, where the union had become a business competitor of the employer, the Board held that the employer was not required to bargain with the Union because the latter might take a position in bargaining for the purpose of damaging the employer's business. Similarly in N.L.R.B. v. Kentucky Utilities Co., 182 F. 2d 810, 812-814 (C.A.6), the court absolved the employer of the duty to bargain so long as one Braswell was a union negotiator, because Braswell had expressed the hope that the company "might go broke" so that "his purpose to destroy the Respondent financially made any attempt at good faith collective bargaining a futility." As I read these cases, it seems fair to conclude that if a party at the bargaining table espouses a position for the purpose of destroying or even crippling the other party to the negotiations, he has not bargained in good faith as required by the Act.

Proceeding from this premise, I find that the Company did not bargain in good faith on the checkoff issue. Long before the outset of negotiations the Company equated the

checkoff with the Union's survival. Company campaign literature emphasized that the Union had disappeared from the scene in 1952 because of the failure to obtain a checkoff. Similarly in 1961 the Company gave a checkoff to the Company union because the Company believed that the checkoff was necessary to that union's survival. In the 1965 negotiations with the Union, the Company's opposition to a checkoff was not based on the cost or inconvenience to the Company (it expressly disclaimed such factors) but allegedly on the "principle" that collection of union dues was union business. The Company departed from this principle in 1961; this alone would not establish bad faith. But the reason assigned for the 1961 "departure" and the 1964 campaign literature lead me to find that the alleged "principle" was grounded in the Company's belief that if it refused the checkoff the Union would suffer and would probably again leave the scene. Where an employer takes a position in bargaining, not to advance his own economic interest or to safeguard the rights or interests of his employees, but for the purpose of damaging or destroying the union with which he is bargaining, then he is not bargaining in good faith. This is not to say that the employer must grant a union's demands which do not appear harmful to the employer, but only to say that the employer's motives and objectives must be legitimate, and the "principle" on which he stands be permissible under the statute (e.g., an unwillingness to prefer the union over other creditors of his employees), not, as here, the impermissible object of harm to the other party. Bausch

& Lomb, supra; Kentucky Utilities, supra.* See also H. K. Porter Co., 153 NLRB No. 119.

Conclusions of Law

By failing to bargain with the Union in good faith over the Union's request for checkoff or other means of facilitating collection of dues, the Company has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the Act.

The Remedy

I shall, of course, recommend an order requiring the Company to cease and desist from its unlawful conduct. In view of the narrowness of the issue presented and the fact that agreement was reached on all other matters, I shall not recommend any broader "cease and desist" order. Affirmatively, I shall recommend an order requiring the Company, upon request, to bargain with the Union on the subject of checkoff or other means of facilitating dues collection, and also requiring it to post an appropriate notice. Although urged to do so by the Union and by the General Counsel, I shall not recommend an order which would compel the Company to grant one of the Union's previous proposals in this area. To be sure, the Company cannot be heard to reiterate positions which (assuming this decision stands) it

*The Company here inquired of the Union if the checkoff was necessary to the Union's survival, and the Union spokesman replied that they hoped they could survive without it, although they also stated "that the previous time that we had a union it folded because it did not have the checkoff." This exchange does not militate against the result reached above, which rests on my finding as to the Company's motive in opposing the checkoff. Similarly, the fact that the Union would have surrendered its demand for a checkoff in return for what it regarded as sufficient other benefits is not material to the issue of the Company's motivation.

has heretofore espoused in bad faith. And any new grounds the Company may urge for opposing the Union's past proposals in this area will be subject to sharp scrutiny as afterthoughts. Cf. Polish National Alliance v. N.L.R.B., 136 F. 2d 175, 181 (C.A. 7), affirmed 322 U.S. 643. Nevertheless I deem it inadvisable, if not in excess of the Board's authority, to direct the acceptance of any particular proposal heretofore advanced by the Union. The subsequent proposals and counter-proposals of the parties on this subject should be subject only to the statutory obligation that they be presented in good faith. In all probability this will lead to the Company's accepting what it regards as the least objectionable of the Union's past proposals, but this is a matter for future negotiations and should not be frozen into the order.

Accordingly, upon the foregoing findings of fact and conclusion of law, and on the record as a whole, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Respondent, Roanoke Iron & Bridge Works, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain in good faith with United Steelworkers of America, AFL-CIO, as the exclusive representative of the employees in the unit certified as appropriate in Case No. 5-RC-4775, insofar as that Union requests bargaining over a voluntary checkoff or other lawful means of facilitating collection of union dues.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

a. Upon request of the aforesaid certified bargaining representative, bargain with it in good faith with respect to

proposals it advances for a voluntary checkoff or other lawful means of facilitating collection of union dues.

b. Post at its plant at Roanoke, Virginia, the notice hereto attached and marked Appendix.[3] Copies of such notice to be furnished by the Regional Director for the Fifth Region, shall after being signed by an authorized representative of the Respondent, be posted immediately upon the receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

c. Notify the said Regional Director in writing within 20 days from the date of its receipt of this Decision what steps the Respondent has taken to comply herewith.[4]

Dated at Washington, D. C.
February 24, 1966

/s/Frederick U. Reel
Frederick U. Reel
Trial Examiner

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[3]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER".

[4]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

[Dated July 19, 1966]

DECISION AND ORDER OF THE BOARD

On February 24, 1966, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent, General Counsel, and Charging Party filed exceptions and supporting briefs.[1]

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, Roanoke

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[1]The Charging Party's request for oral argument is denied as the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

Iron & Bridge Works, Inc., Roanoke, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C.

JULY 19, 1966

/s/ Frank W. McCulloch
Chairman

/s/ John H. Fanning
Member

/s/ Sam Zagoria
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[Dated July 19, 1966]

Members Brown and Jenkins, dissenting:

The issue posed by the complaint was whether the Company "negotiated with the union in bad faith and with no intention of entering into a final or binding agreement." Although the checkoff proved to be a major issue, the record shows: (1) neither the preelection conduct of Respondent nor its subsequent actions reflect an unwillingness to bargain; (2) there in fact was bargaining over the disputed issue;

(3) the Respondent did more than reject the Union proposals, it engaged in full discussion and made counter-proposals of its own; and (4) a contract was executed covering agreement on all other matters. We cannot conclude on this record that the Company's positions were taken for the purpose of injuring the Union or that bad faith was present. Accordingly, we would dismiss the complaint.

Dated, Washington, D. C.

JULY 19, 1966

/s/ Gerald A. Brown
Member

/s/ Howard Jenkins, Jr.
NATIONAL LABOR
RELATIONS BOARD

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 20,514

ROANOKE IRON & BRIDGE WORKS INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED STEELWORKERS OF AMERICA AFL-CIO
Intervenor

DECREE

Before: BURGER, LEVENTHAL AND ROBINSON, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petitions of United Steelworkers of America, AFL-CIO and Roanoke Iron & Bridge Works, Inc. to review an order of the National Labor Relations Board issued against Roanoke Iron & Bridge Works, Inc., its officers, agents, successors and assigns on July 19, 1966 and upon the Board's request for enforcement of said order. The Court heard argument of respective counsel on March 16, 1967, and has considered the briefs and transcript of record filed in this cause. On December

27, 1967, the Court being fully advised in the premises, handed down its decision denying the petitions for review of the Company and the Union and enforcing the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Roanoke Iron & Bridge Works Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

OPINION OF JUSTICE LEVENTHAL
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,514

(Argued March 16, 1967 Decided Dec. 27, 1967)

Before BURGER, LEVENTHAL and ROBINSON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* The National Labor Relations Board (Board) concluded that the Roanoke Iron & Bridge Works (Company) violated Section 8(a) (5) of the National Labor Relations Act,[1] by virtue of its conduct during the period of negotiations between October 1964 and October 1965 with the United Steelworkers of America, AFL-CIO (Union), which had been duly certified by the Board following a 97 to 26 vote in a representation election of September 7, 1964. We affirm the Board's order, rejecting attacks by both the Union and the Company.

I. Substantial Evidence Supporting the Board's Finding That Company's Negotiations on Checkoff Issue Were Not in Good Faith.

In our view there was substantial evidence supporting the Board's critical finding that the Company did not bargain in good faith on the checkoff issue.

The background evidence reaches back to 1951, when the Union, after election and certification, entered into a collective bargaining agreement with the Company. At that time the Company rejected the Union's request for a voluntary

[1] 29 U.S.C. § 158 (1964).

checkoff (a system by which the Company pays directly to the Union the dues of those employees who consent to such deductions from their paychecks). By the time the 1951 contract expired, the Union had lost its majority status.

In 1961 the Company bargained with a different certified employee representative — the Steel Fabricators Union of Roanoke, Virginia, a local organization composed wholly of Company employees. The Steel Fabricators also requested a checkoff, claiming in support of it that without some Company cooperation in dues collection that union could not survive. Initially the Company took the same position adverse to the checkoff that it had assumed a decade earlier. But it discontinued its seemingly steadfast opposition to participation in dues collection, and decided to help the Steel Fabricators by granting the checkoff. However, by the time the 1961 contract had expired so had the local union.

When the Union, early in 1964, sought to resume as bargaining representative of the Roanoke employees the Company offered vigorous opposition. The Company peppered its election propaganda with copious allusions to the Union's prior activity at the plant. In a letter of July 1, the Company boasted that because a checkoff had not been granted in 1951, the Union had been forced to abandon the Roanoke plant. The Company's letter of August 13, 1964, reiterated that in 1951 "we drew the line at collecting Union dues out of your pay check," adding: "Within a few months, many employees stopped paying the Union any money, when they found out they did not need a Union, and when the contract ran out, the Union pulled out and left us." On September 1, 1964, a week before the election, the Company stated that the primary reason for the Union's organ-

izational efforts at Roanoke was to fatten its coffers. The Company's letter the following day contained questions-and-answers on contract checkoffs that reflected its opposition to them.

Against this background bargaining began in October 1964. In March 1965, after 12 or 13 meetings, the Union called a strike which lasted until the fall. Another 12 or 13 bargaining sessions were held during the strike. A primary subject of discussion at each of the 25 bargaining sessions, and a primary cause of the strike, was the Union's demand that the contract contain a provision for voluntary checkoff or other means of facilitating collection of union dues and the Company's refusal to grant this demand. The Union offered and the Company rejected seven alternative dues collection schemes to voluntary checkoff. The strike ended with an agreement that was silent on checkoff, without prejudice to the Union's urging to the Board that the Company had violated the Act by refusing to bargain in good faith on the checkoff.

In opposing the checkoff the Company reverted to the same reason it had offered in 1951, namely, that as a matter of "principle" no cooperation on dues collection would be given. But the Board found it had negotiated in bad faith. We repeat verbatim, without attempt at paraphrase, the critical findings on bad faith which appear in a concluding section of the Examiner's decision duly adopted by the Board:

> I find that the Company did not bargain in good faith on the checkoff issue. Long before the outset of negotiations the Company equated the checkoff with the Union's survival. Company campaign literature emphasized that the Union had disappeared from the scene in 1952 because of the failure to obtain a checkoff.

> Similarly in 1961 the Company gave a checkoff to the Company union because the Company believed that the Checkoff was necessary to that union's survival. In the 1965 negotiations with the Union, the Company's opposition to a checkoff was not based on the cost or inconvenience to the Company (it expressly disclaimed such factors) but allegedly on the "principle" that collection of union dues was union business. The Company departed from this principle in 1961; this alone would not establish bad faith. But the reason assigned for the 1961 "departure" and the 1964 campaign literature lead me to find that the alleged "principle" was grounded in the Company's belief that if it refused the checkoff the Union would suffer and would probably again leave the scene.

The evidence amply permits the inference that the Company's bargaining stance was adopted in order that the Union's status as bargaining representative, which it had unsuccessfully resisted in the election campaign, might be weakened and destroyed.

The Examiner and the Board concluded that no one of the facts relied on was sufficient in itself as the predicate for a finding that the Company's position on the checkoff was motivated by bad faith. Considering the facts cumulatively, however, the Board found bad faith and we cannot hold that the finding was unreasonable.

II. Validity of Board's Conclusion That Such Negotiations Violated Company's Statutory Duty.

The Company's contention that the Board's order must be set aside rests essentially on a supposition that as a matter of law the Company's conduct was permissible and could not be condemned.

The Examiner's opinion provides this capsule of the Board's legal premise—that "if a party at the bargaining table espouses a position for the purpose of destroying or even crippling the other party to the negotiations, he has not bargained in good faith as required by the Act." We approve this construction of the statute.

Section 8(d) of the Act, which expressly requires the parties to meet "and confer in good faith with respect to . . . terms and conditions of employment," establishes a duty that is a salient and integral part of the duty "to bargain collectively" set forth in § 8(a)(5).[3] The subject of dues checkoff is a mandatory subject of bargaining[4] under §§ 8(a)(5) and 8(d), and the Company does not contend to the contrary. In another phrase § 8(d) provides that the statutory duty does not compel a party "to agree to a proposal or require the making of a concession." However this qualification does not permit an employer—by a mere claim that it was only engaged in "hard bargaining" on the checkoff—to escape condemnation when it has refused to bargain in good faith. This proposition is clear enough when the party's good faith is negatived by its purpose to frustrate any agreement what-

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[3] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 209-10 (1964); NLRB v. Katz, 369 U.S. 736, 742-43 (1962).

[4] NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 136 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). It is commonplace that voluntary checkoff is the subject of collective bargaining. United Steelworkers (H.K.Porter Co.) v. NLRB, — U.S.App.D.C. —, 363 F.2d 272, 274, n.6, *cert. denied*, 385 U.S. 851 (1966). Industrial practice is appropriately considered in ascertaining the scope of mandatory bargaining. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 408 (1952). *Cf.* Brotherhood of Ry. Trainmen v. Akron & Barberton Belt R.R. Co., — U.S.App.D.C. —, — F.2d — (No. 20152, May 12, 1967) (slip opinion pp. 32-33).

ever.[4] We think it is equally clear that a company (or union) may not assume an intransigent position in bad faith on a mandatory subject of bargaining even though its purpose to frustrate an agreement on that issue coincides with a willingness to reach some overall agreement. This follows from *NLRB v. Katz*, 369 U.S. 736 (1962), holding that the Act condemns a refusal to negotiate in fact about a mandatory subject even though the employer in good faith desires some overall agreement.

The Company's purpose to avoid an agreement on one issue is not necessarily bad faith, as is plain from the provision of § 8(d) already quoted. But the Company is mistaken in supposing that it is immune from condemnation for bad faith merely because it defines its immediate bargaining tactic as the refusal to agree on one issue.

The crucial question, whether a party has met its statutory obligation to bargain in good faith, typically turns on the facts of the individual case.[5] The significance of those facts is properly assessed in the light of the various statutory provisions and their purpose.

Section 8(a)(5) has the significant purpose of fostering collective bargaining agreements, employing as the means to accomplish this object the requirement that the parties honestly attempt to reach an accord. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). "While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result. . . . Good-faith bargaining necessarily

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[4] See United Steelworkers of America, AFL-CIO (H.K.Porter Co.) v. NLRB, — U.S.App.D.C. —, 363 F.2d 272, *cert. denied*, 385 U.S. 851 (1966).

[5] *E.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 410 (1952).

requires that claims made by either bargainer should be honest claims." 351 U.S. at 152.

The determination and proper application of § 8(a) (5) is illuminated by the objective of this and the other unfair labor practice provisions of providing means to the end of promoting industrial stability in the labor management area. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

At the heart of the Act is the basic directive that management recognize the employee representative.[6] This is a crucial, pervasive mandate woven throughout the pattern of the Act and the varying obligations imposed by Congress. In an election context, § 8(a) (1) prevents management interference with the selection of a representative. Section 8(a) (2) prevents the employer from incapacitating the union by substituting its designee as the employee representative. Section 8(a) (3) does not purport to take away management's basic right to hire and fire, but its prohibition draws the line against employment of personnel policies with the purpose or effect of undermining the union.

Section 8(a) (5) is of the same fabric. A leading student of American labor policy points out that a key object of the requirement of collective bargaining is that management concede the existence of the employee labor organization. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407-09 (1958). As the Supreme Court said in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 484-

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[6] "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ." National Labor Relations Act, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

85 (1960): "That purpose [of 8(a) (5)] is the making effective of the duty of management to extend recognition to the union; the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union."[7]

This basic policy suffuses a variety of § 8(a) (5) cases. The employer is prohibited from making unilateral changes in working conditions during negotiations – even though the terms of employment are thereby improved – lest the union be denigrated in the employees' eyes and its existence, as an inevitable result, imperiled. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); *NLRB v. Insurance Agents' International Union, supra,* 361 U.S. at 485 (dictum). Similarly, issues have been deemed unbargainable (and thus, cannot be insisted upon to the point of impasse) where the effect of incorporating their terms in the agreement would be to deprive the union of its independence and vitality. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958).

Distinguishable in details of legal context but highly material in central thrust are the many cases that have established the doctrine that an employer cannot delay or refuse to engage in bargaining in order to gain time wherein the union's

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[7]See remarks of Senator Wagner on S. 1958, 79 CONG. REC. 7571 (1935): "But the right of workers to bargain collectively through representatives of their own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives. The Government itself is held up to ridicule when the elections which it supervises are rendered illusory by failure to acknowledge their results. And needless to say, such a contradictory course generates perpetual discontent and strife."

weak majority may deteriorate, if his action is not in fact motivated by good faith doubts based on reasonable grounds.[8]

The requirement of "good faith," involving as it may an analysis of the motives of the parties, is a standard often difficult to apply. In designating what motivations run afoul of that requirement, the Board is not authorized to usurp the functions of the union or the company and dictate the terms of labor contracts. Administrative agencies will be required to follow Congressional mandate, whether explicit or ascertainable as inherent in underlying policy. In this case, however, the Board has not strayed from but has rather stayed within the course charted in the statutory provisions. Entering or conducting negotiations with the intent to destroy the other party would appear to be the archetypal example of a violation of the requirement that the parties must act in good faith. This basic conception, which has been applied by the Board and the courts in negativing good

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[8] Joy Silk Mills, Inc. v. NLRB, 87 U.S.App.D.C. 360, 369, 185 F.2d 732, 741 (1950), *cert. denied*, 341 U.S. 914 (1951); Amalgamated Clothing Workers (Sagamore Shirt Co.) v. NLRB, 124 U.S.App.D.C. 365, 376, 365 F.2d 898, 909 (1966); Skyline Homes, Inc. v. NLRB, 323 F.2d 642, 648 (5th Cir. 1963), *cert. denied*, 376 U.S. 909 (1964); NLRB v. Charles R. Krimm Lumber Co., 203 F.2d 194, 196 (2d Cir. 1953); Colson Corp. v. NLRB, 347 F.2d 128, 138 (8th Cir.), *cert. denied*, 382 U.S. 904 (1965). The employer violates the act even where he has good faith doubts as to the appropriate unit, and hence the union's majority status, where these doubts are not "the key motivating factor in [his] refusal to bargain," for example, where he delays resolution of his doubts, if any, to help assure that, no matter what unit is ultimately deemed appropriate, the union will not have a majority. NLRB v. Luisi Truck Lines, — F.2d — (9th Cir. No. 21554, Oct. 27, 1967); Louisville Typographical Union No. 10 v. NLRB, No. 20691 (D.C. Cir. December 19, 1967); *cf.* NLRB v. Austin Powder Co., 350 F.2d 973, 977 (6th Cir. 1965).

faith on the part of the union,[9] is fully applicable in negativing good faith on the part of the employer.[10]

The employer cannot claim that he satisfied the statutory obligation by solemnly attending bargaining sessions where checkoff was nominally on the agenda, then reciting that checkoff was being rejected as a matter of principle. The Act not only requires that the parties go through the motions of negotiation, but it also demands that they negotiate in good faith. Here there was a finding that the complete rejection of the Union's request for a checkoff or other dues collection assistance was not a bargaining in good faith. The Board's crucial finding negativing good faith was amply supported by the evidence: the 1964 campaign literature wherein the company itself identified refusal of checkoff with undermining this union's position; the 1961 action wherein the Company granted the checkoff to the more favored local union; the lack of reliance on inconvenience or other business purpose;[11] and the blanket refusal to consider alternatives—all in a context of vigorous anti-union animus.

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[9]See NLRB v. Kentucky Util. Co., 182 F.2d 810 (6th Cir. 1950); Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954).

[10]In NLRB v. J. A. Terteling & Sons, Inc., 357 F.2d 661 (9th Cir. 1966) (per curiam), the court, quoting the Board, found a breach of the duty to bargain in good faith where "Respondent [Company] approached the bargaining table not with the sincere purpose of bargaining in good faith but to prolong negotiations and undermine the Union's status as majority representative, and thus to evade its statutory bargaining obligations." 357 F.2d at 661-62.

[11]The Union agreed to sustain any expense incident to a checkoff. Several of the rejected alternatives did not require the management to take any action.

The fact that the Board considered the absence of business purpose as an evidentiary indication negativing good faith in the circumstances of this case is not to be taken as a ruling that business purposes are the only watchword for good faith.

The Company put forward on argument the possibility that a company may hold back a checkoff for trading purposes. Assuming that the disclosure of such business purpose would have enabled the Company to avoid the condemnation of bad faith, the simple fact is that in the case before us no such point was put forward to the Union in the bargaining sessions. Instead the Company hardened on an alleged point of principle—a claim at odds with both its conduct, including the checkoff granted in 1961 to another union, and its concession that checkoff is a mandatory subject of bargaining. An employer disingenuous in its bargaining sessions must take the risk of being taken at face value and being held to have violated its duty, for good-faith bargaining requires "honest claims." *NLRB v. Truitt Mfg. Co., supra,* 351 U.S. at 152.

It was the responsibility of the Trial Examiner and the Board to glean the state of mind of the agents of the Company from an examination of all the surrounding circumstances.[11] Congress has declined to restrict this function of

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[11]NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154-55 (1956) (Frankfurter, J., concurring in part and dissenting in part); Retail Clerks Union v. NLRB, 117 U.S.App.D.C. 336, 342 n.5, 330 F.2d 210, 216, *cert. denied,* 379 U.S. 828 (1964); Local 833 v. NLRB, 112 U.S.App. D.C. 107, 114, 300 F.2d 699, 706, *cert. denied sub nom.* Kohler Co. v. Local 833, 370 U.S. 911 (1962); Joy Silk Mills, Inc. v. NLRB, *supra* at 370, 185 F.2d at 742; NLRB v. National Shoes, Inc., 208 F.2d 688, 691 (2d Cir. 1953); Solo Cup Co. v. NLRB, 332 F.2d 447, 448 (4th Cir. 1964).

the Board.[11] The Board's finding negativing good faith is supported by substantial evidence in the record taken as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492-97 (1951). With that finding there is no barrier in law to the determination that the Company has violated § 8(a)(5).

III. Remedy.

The Union urges that any relief short of requiring the Company to accept a voluntary checkoff is inadequate since it will not promote the policies of the Act. We must reject this contention in view of the discretion that Congress has conferred on the Board, with its training and experience, to accomplish the policies of the Act. *Fibreboard Paper Prods. Corp. v. NLRB*, *supra*, at 216; *Oil, Chemical & Atomic Workers (Allied Chemical) v. NLRB*, 124 U.S.App.D.C. 113, 115-16, 362 F.2d 943, 945-46 (1966).

The Union complains that this resolution means it has a right but no meaningful remedy. The court's judgment affirms the Board's order to the Company to bargain in good faith. Should the Company continue to refuse to bargain about a dues-collection provision in good faith the Board may apply to the court to take further action, and even invoke the power to punish for contempt. We cannot assume that an employer, aware of the burden that attaches to a party that has already shown bad faith, will fail in the future to bargain in accordance with its obligations. Whether

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[11] In 1947, certain members of Congress were dissatisfied with leaving to the Board a relatively free hand in determining from the facts whether the employer had met the subjective requirement of good faith bargaining. In response, an effort was made to define narrowly what constituted "collective bargaining." H.R. 3020, 80th Cong., 1st Sess. § 11. This restrictive measure was rejected by the House and Senate Conferees in favor of the present § 8(d). See H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 34-35 (1947).

more effective relief is appropriate or necessary to effectuate the Act is a question primarily for the Board."[11] We cannot say it acted outside its proper range of discretion.

The petitions of the Company and the Union for review will be denied, and the Board's order will be enforced.

So ordered.

BURGER, *Circuit Judge, dissenting:* The Board here postulates the novel and internally inconsistent proposition that a bargainer can be found to have refused to bargain in good faith even though bargaining in good faith to reach and actually reaching a final and binding contract. The Board accomplishes this sleight-of-hand result by isolating one part of the whole spectrum of bargainable issues and saying, in effect, that on *this* particular issue, the employer *must* yield to the union unless he can give a satisfactory "business reason" for refusing. The Board does not undertake to spell out how an employer could satisfy this unique standard. My use of the adjective "novel" and "inconsistent" derives from 29 U.S.C. § 158(d) (1964) which, while it commands that the parties bargain and "confer in good faith," adds the significant qualification that "such obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession."

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[11] See United Steelworkers of America, AFL-CIO (H. K. Porter Co.) v. NLRB, — U.S.App.D.C. —, — F.2d — (Nos. 19492, 19507, December 8, 1967) (on motion for reconsideration of denial of motion to clarify decree).

Despite this latter provision, the Board of necessity has considered the reasonableness of parties' positions on particular issues to determine whether, under all the circumstances of the negotiation, a particular bargaining position was adopted for the purpose of frustrating negotiation generally and thus preventing an agreement.[1] But the courts have been vigilant lest the examination of parties' position to test good faith become a process of judging, directly or indirectly, the substantive terms of their proposals.[2] Consequently, when the Board does inquire into the reasonableness of a position, its inquiry is not whether refusal of a certain demand is unreasonable but rather whether, in light of all the circumstances of the negotiation, there is evidence of a calculated effort to frustrate agreement *generally*; the issue is not whether the particular refusal is an unfair labor practice itself.[3]

The majority and the Board are unable to cite any case in which refusal to accept a single demand was held to be an unfair labor practice except where it was treated as evidence of *general* bad faith. The recent case of this Court

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[1] *E.g.*, NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir. 1960); Majure v. NLRB, 198 F.2d 735 (5th Cir. 1952).

[2] *E.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964); NLRB v. Lewin-Mathes Co., 285 F.2d 329 (7th Cir. 1960); White v. NLRB, 255 F.2d 564 (5th Cir. 1958).

[3] while the Board cannot force an employer to make a "concession" *on any specific issue* or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union . . . .

NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953) (first emphasis added, other in original).

relied on by the Board in its brief is such a case.[4] *See United Steelworkers (H. K. Porter Co.) v. NLRB*, 124 U.S. App.D.C. 143, 363 F.2d 272, *cert. denied*, 385 U.S. 851 (1966). In the *H. K. Porter* case, there was a past history of findings of bad faith bargaining, and the trial examiner found that the refusal to agree to a checkoff was "*for the purpose* of frustrating agreement with the union." *i.e.*, frustrating *any* agreement. *Id.* at 144, 363 F.2d at 273 (emphasis added). This crucial finding in the *H. K. Porter* case is missing here; in fact, the contrary was the conclusion of the trial examiner—he found that the Company did intend to reach an agreement. The reliance in the *H. K. Porter* case on the lack of a valid reason for the refusal was directed toward the determination of whether the intransigence was designed to frustrate all negotiation. In the present case, the Board has converted *some evidence* of bad faith on a single issue into bad faith *per se*.

The trial examiner's opinion and the majority's both find comfort in the cases of *NLRB v. Kentucky Util. Co.*, 182 F.2d 810 (6th Cir. 1950), and *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555 (1954). But these cases do not deal with bad faith bargaining on one issue. They merely hold that an employer need not bargain with a union representative who seeks to destroy the employer or with a union which has become a business competitor of the employer. These situations were held to be defenses to charges of unfair labor practices against the employer who refused to bargain, rather than themselves supporting an unfair labor practice charge.

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[4] NLRB v. J. A. Terteling & Sons, Inc., 357 F.2d 661 (9th Cir. 1966), cited by the majority, is another case of general bad faith, where the employer was found to have negotiated "with no intention ever to reach an agreement." *Ibid.*

Moreover, they dealt with general hostility, not with particular issues in what was otherwise good faith bargaining.

If I read the majority correctly, it decides that the conclusion of "bad faith" on one subject alone is sufficient to support an unfair labor practice. This holding, the majority claims, "follows" from *NLRB v. Katz*, 369 U.S. 736 (1962). It is quite true that *Katz* found a failure to bargain in good faith even though there was no finding of over-all subjective bad faith. But that decision did not say that bad faith can now be found in the unreasonableness of one party's bargaining positions. In *Katz*, the question of good or bad faith in bargaining was never reached; there was instead a finding of a refusal to "bargain." Referring to the duty to bargain collectively as defined in § 8(d), the *Katz* opinion stated: "Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact*—'to meet . . . and confer'—about any of the mandatory subjects." *Id.* at 743. In *Katz*, the employer made changes in wages, sick-leave benefits and merit increases while these matters were under discussion with the union; these were obviously unfair tactics. The Court said

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.

Id. at 747. This language makes it quite clear that *Katz* rests on a "refusal to negotiate" on the terms in question. This clear violation of the duty to bargain in good faith is a far cry from a violation based upon a subjective analysis

of the motives behind a bargaining position on a single issue of a party who does in fact negotiate and make a contract. Consequently, it is simply not correct to say that it "follows" from *Katz* that a refusal to agree to one bargaining demand even if for an impermissible reason is by itself a failure to bargain in good faith.

It may be tempting to suggest that a corollary of the duty to bargain to reach an overall agreement is a duty to bargain with the object of reaching an agreement on each item proposed. But this has never been held to be the law by any court and it is inconsistent with the § 8(d) provision that neither party need yield on a point. Merely because the employer proposes a management prerogative clause does not mean that the union bargains in bad faith if it fails to seek agreement on some form of management prerogative clause.[5] Would a union be guilty of bad faith bargaining if it adamantly refused to accede to a clause identifying precisely whom the union should include in its negotiating committee? Surely a union could refuse — adamantly and rigidly — to agree to any such clause, standing on the "principle" that selection of its negotiators is for the union exclusively. Why should the same reasoning not apply to the Company's refusal?

Of course, no one would presume to argue that a mere failure to agree to the dues checkoff would be an unfair labor practice. Instead, this case turns on the unique proposition that the negotiator's *motive* for the failure to agree to a checkoff can support a finding of bad faith bargaining. This does not seem compatible with the Board's finding that there was a good faith effort to reach an agreement

[5] In NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952), the union flatly refused to agree to such a clause and there was no suggestion that it was improper to do so.

generally. The trial examiner's determination of bad faith was premised on his finding that the Company's bargaining was "grounded in the Company's belief that if it refused the checkoff the Union would suffer and would probably leave the scene." The proposition of law that the Company is said to have violated was stated by the trial examiner as follows:

> To bargain in good faith, the bargainer must advance his contentions and reject the other party's contentions (when he does) for legitimate reasons of self-interest, and out of what appear to him to be sound considerations of business (or union) judgment.[6]

No authority is cited for the proposition that failure to give "business" reasons for rejection of a demand is itself an unfair labor practice. Would there not be "legitimate reason of self-interest" in withholding approval of dues checkoff until some year's bargaining when the Company had little else to offer?

The majority rather startlingly dismisses the possibility that the refusal was a bargaining tactic[7] because "in the

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[6]It is perfectly clear from the following quote from the trial examiner's opinion that this rule requires an examination of the *motives* of the bargainers:

> Where an employer takes a position in bargaining, not to advance his own economic interest, or to safeguard the rights or interests of his employees, but for the purpose of damaging or destroying the union with which he is bargaining, then he is not bargaining in good faith. This is not to say that the employer must grant a union's demands which do not appear harmful to the employer, but only to say that the employer's *motives and objectives must be legitimate*, and the "principle" on which he stands must be permissible under the statute (e.g., an unwillingness to prefer the union over other creditors of his employees) not, as here, the impermissible object of harm to the other party. (emphasis added.)

[7]The majority appears to concede that holding back on an issue for "trading purposes" is a legitimate business reason. See p. 10 *supra*.

case before us no such point was put forward to the Union in the bargaining sessions." Presumably this means that the Company should have told the Union it was merely refusing to grant a checkoff as a bargaining tactic. It should be apparent what the next step from this position is. The employer refusing to agree to a term and stating that it is doing so as a bargaining ploy will find the "cost" in terms of the counter-concessions that it demands weighed to determine whether it is a good faith bargaining position. Otherwise, it would be simple for an employer to set a prohibitive cost to a union as the concession for which it is withholding agreement on a union demand. Once the rule is propounded, it cannot be permitted to be circumvented so simply. Thus, once such rule is made, it is quite clear that the Board and the courts are immersed in the substantive terms of the collective bargaining contract. This is not their role and the Supreme Court has been quite clear on this point.*

Furthermore, to admit that bargaining tactics are legitimate reasons to refuse to yield on a point and then to say that this reason can only be relied upon when it is revealed to the other party is to ignore the realities of the bargaining table. As the findings of this case indicate, bargaining motives are seldom singular, rarely articulated fully and frankly and often not susceptible to a clear and logical exposition. Most positions are at least partly taken for "trading purposes." The willingness to trade will quite naturally depend upon the importance of a particular issue

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* the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.
NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

to a bargainer. Particularly where there is some coolness in the bargaining,* it is unrealistic to expect bargainers to announce their positions and then declare that they are not firm positions, but are taken only in order to be traded away. This is especially unrealistic where the party intends to reserve a particular concession for another contract negotiation when he has greater need to use this valuable concession. Collective bargaining, after all, is a recurring process and each contract negotiation is influenced by those that went before and indeed by those to come.

Although apparently no case has held explicitly that a bargainer may legally refuse a demand without giving some "business" reason, there is authority implying that he may lawfully do so. In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), the employer conditioned acceptance of a contract on a "ballot" clause calling for a pre-strike secret vote of the employees (union and non-union) and a "recognition" clause which named the Local a party to the contract but excluded the International, which also had been certified by the Board. An employer might be hard pressed to articulate a "business" reason for this, yet the case turned on whether these issues were mandatory

*Referring to the attitudes of those in the bargaining situation, in another case where the employer refused to grant the union a check-off, the First Circuit observed:

> we recognize the existence of a cool atmosphere between respondent and its opposite number across the bargaining table. The company did not want this union and over a period of years had been successful in keeping it out. It could not be expected that after the Union had finally won the battle it would be welcomed in with open arms. On its part, the Union, quite naturally, was determined to bring respondent into line with the other bus companies with which it had collective bargaining agreements.

NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729, 731-32 (1st Cir. 1964).

subjects under § 8(d) so that insistence to the point of impasse would be permissible and the Supreme Court held that they were not. There was no indication that if these issues were mandatory the employer could not have bargained to impasse because of the absence of a permissible business reason.

It is clearly on the premise that the motive for a bargaining stance on *each issue* must be a sound business—or union—reason that the present decision rests.[10] But the Supreme Court has said to the contrary. In *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 488 (1960), the Court said that

> It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement . . . . But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.

In explaining why economic weapons to support a bargaining position are perfectly permissible, despite the Act's command to bargain in good faith, the Supreme Court has stated that:

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence — still proceed from contrary and to an extent antagonistic viewpoints and concepts of self in-

[10] The majority finds "bad faith" in that "the Company's bargaining stance was adopted in order that the Union's status as bargaining representative, which it had unsuccessfully resisted in the election campaign, might be weakened and destroyed." *Supra* p. 5.

> terest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

Id. at 499-89.

This permissible use of economic weapons to support a bargaining position confirms the accepted reality that collective bargaining is more a practical—even brutal—economic confrontation than a staesmanlike minuet. Not only is the union permitted to strike to put economic pressure on the employer to accede to its demands, *e.g., NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960), but also there is the recognition that the employer is entitled to use the lockout, although not as freely as a union may strike, as an economic weapon. *See American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown Food Store*, 380 U.S. 278 (1965).

Of course, the claim here is that the refusal was designed to "harm" the union.[11] An employer with all his employees on strike is "harmed" much more severely than a union without a dues checkoff. The "harm" element clearly cannot stand alone, unless it is clear that the refusal is somehow different from permissible economic pressure placed on the union in the course of bargaining. Certainly, an employer cannot deliberately inflict economic pressure to weaken a union during bargaining. My point is simply that because

[11] The majority opinion (see note 8 and related text) seems to rest its case in part on holdings in situations where an employer used dilatory tactics in bargaining in order to weaken the union. No such factors are present here. The parties bargained, they agreed, they made a contract; the union then resuscitated one of its demands, in isolation, by way of an unfair practice claim.

the absence of a checkoff will cause extra expense and work for the Union and because the Company is aware of this fact does not distinguish this case from the normal economic pressures of the collective bargaining situation.

The majority opinion encourages a new bargaining device that can only serve to infringe on the whole collective bargaining process. The parties may now reach an over-all contract incorporating those provisions they agree on and excluding those they do not, after the usual "horse" trading processes of bargaining, then one party can come to the Board and claim that the refusal to agree to some provision which was not included was an unfair labor practice because the recalcitrant party lacked a sufficient business or union reason. In the present case, the Union accepted the terms of the contract that emerged from the bargaining and signed a formal contract. In the give and take of collective bargaining, the inclusion of a checkoff provision may well have meant a different treatment of some other clauses—wages for example. The Board and unions generally may well come to regret the day when component parts of bargained issues are considered in isolation.

I suggest that today's holding contains the seeds of danger for unions in their collective bargaining rights. The standards for bargaining in good faith are of necessity a two-way street; what the majority decides today applies to unions as well as to employers. Freedom of contract is highly important and to no one more than to the worker whose economic position is inherently weaker than that of the employer. A holding that the duty to bargain means one bargainer is *compelled* to agree, apart from being a contradiction in terms, is pregnant with the risk of a finding one day that a union must yield to some particular employer proposal unless it can articulate a solid union reason for not doing so. I would reject the notion that a union, in this context, must explain its motives to anyone.

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No. 1254

In the Supreme Court of the United States

OCTOBER TERM, 1967

ROANOKE IRON & BRIDGE WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38–60) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. 15–35) are reported at 160 NLRB 175.

JURISDICTION

The decree of the court of appeals (Pet. App. 36–37) was entered on December 27, 1967. The petition for a writ of certiorari was filed on March 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

297-344—68

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the employer failed to bargain in good faith regarding the union's request for a clause providing for the checkoff of union dues.

2. Whether the Board properly concluded that the employer's lack of good faith on the checkoff issue was not excused by the circumstance that the employer was willing to, and did, reach an agreement with the union on other matters.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are set forth in the Appendix to the petition (p. 14).

STATEMENT

In 1951, the United Steelworkers of America, AFL–CIO (the Union) [1] was certified as the representative of the Company's employees. A period of protracted bargaining ensued, largely because of the Company's refusal to accede to the Union's request for a voluntary dues checkoff clause—a provision requiring the Company to deduct union dues from the wages of employees authorizing such a deduction and pay such amounts over to the Union (Pet. App. 16; J.A. 51.) [2] When the Union finally yielded on this issue, a one-year contract was signed; but when that contract ex-

[1] The Union was the charging party before the Board and was a party in the court of appeals proceedings; it is thus a party here.

[2] "J.A." refers to the Joint Appendix in the court below.

pired, no attempt was made to negotiate another one (Pet. App. 16; J.A. 14).

In 1961, the Steel Fabricators Union, an independent union composed solely of the Company's employees, was formed and later certified by the Board. That union asked for and was granted a voluntary dues checkoff clause (Pet. App. 16; J.A. 9, 94–95). The Company acceded to this request because "they said it would be a great help to them if we would do this for them," and because that union could not survive without it (Pet. App. 16–17; J.A. 52, 64–65). No union dues were actually checked off, however, and the Steel Fabricators Union had ceased to exist by 1964 (Pet. App. 18; J.A. 10).

In mid-1964, the Steelworkers Union again began to organize the Company's employees. The Company countered with a series of letters. Thus, in a letter dated July 1, the Company boasted that, because a checkoff had not been agreed to in 1951, "this contract [with the Union] was not renewed the following year" (Pet. App. 19; J.A. 82–83). On August 13, the Company wrote that "[w]e agreed on a few things [in 1951], but we drew the line at collecting Union dues out of your pay check [and] [w]ithin a few months, many employees stopped paying the Union any money * * *, and when the contract ran out, the Union pulled out and left us" (Pet. App. 19; J.A. 84–86). And, in a letter dated September 2, the Company again emphasized that, when the employees had stopped paying dues "ten years ago * * * the Union walked off" (Pet. App. 21; J.A. 91–93).

On September 7, 1964, the Union nonetheless won a Board election (by a vote of 97 to 26), and was again certified as the representative of the Company's employees (Pet. App. 21; J.A. 16). Bargaining negotiations began in October 1964, and late in October 1965, after about 25 meetings and an eight-month strike, the parties signed an agreement which covered all issues except union dues checkoff. The Company refused to accept any form of dues collection clause, and the parties agreed to submit the question whether the Company had bargained in good faith on that issue to the Board for determination (Pet. App. 21–22).

The facts with respect to the bargaining on the dues collection issue may be conveniently summarized. That issue was raised at each of the bargaining sessions, the Union suggesting six alternative plans for collecting dues and the Company rejecting all of them (Pet. App. 22–23). The Union pointed out that the employees were scattered over a large area around Roanoke, thus making individual collections impracticable, and that, when the Union last represented the Company's employees, it had been unable to survive without a dues checkoff (Pet. App. 24; J.A. 20, 25, 33, 60). The Union also noted that the Company had granted a checkoff to the Steel Fabricators Union when that union represented its employees, and that it made payroll deductions for the United Fund, a local charity (Pet. App. 24; J.A. 12, 16). Basically, the Company's position was that, since the Union had won the election by a large margin, it should collect its own dues—dues collection was the Union's

job and not the Company's (Pet. App. 24; J.A. 16–17, 20). The Company did not claim that a checkoff would be inconvenient or too expensive (Pet. App. 24; J.A. 20, 47). The Company acknowledged that it had granted the checkoff to the Steel Fabricators Union because that union claimed that it could not survive without it (Pet. App. 24; J.A. 52). It also acknowledged that the reason it made deductions for the United Fund was that, without them, only a portion of the money pledged could be collected and thus the program would not be able to function effectively (Pet. App. 25; J.A. 12, 59).

The Board (with two members dissenting) adopted the Trial Examiner's findings that the Company refused to agree to a dues checkoff for the purpose of damaging or destroying the Union, and that the Company thereby refused to bargain in good faith on that issue. Accordingly, the Board concluded that the Company had violated Section 8(a) (5) and (1) of the Act (Pet. App. 28–30, 33), and ordered the Company to cease and desist from the unfair labor practice found, to bargain in good faith with the Union with respect to its checkoff proposals, and to post appropriate notices (Pet. App. 31–32). The court of appeals (with one judge dissenting) sustained the Board's findings and enforced its order (Pet. App. 38–60).

ARGUMENT

1. The basic issue which petitioner seeks to raise—*i.e.*, whether an employer violates his bargaining obligation under the Act where he declines as a matter of "principle" to agree to the union's dues checkoff

provision—is not presented here. The Board found, and the court of appeals sustained its finding, that the Company's refusal to accede to such a clause was not grounded simply on its belief that an employer should not help a union collect its dues, even though a consequence of this position would be to weaken the union. Rather, the Board found, the Company's intent, in taking the position it did on this issue, was to weaken and destroy the Union (Pet. App. 28–29, 41). Accordingly, the threshold question is whether the Board's finding as to petitioner's purpose in refusing to agree to a checkoff provision is supported by substantial evidence. Such an issue does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the court below correctly concluded that the Board's finding that the Company acted in bad faith is amply supported by the record.[3]

2. Contrary to petitioner's contention (Pet. 9), the Board's decision in this case is fully consistent with the principle enunciated in *National Labor Relations Board* v. *Katz,* 369 U.S. 736. That case holds that an employer violates his bargaining obligation under the Act where he takes action on a mandatory bargaining subject without first negotiating with the union, not-

[3] As the court below noted (Pet. App. 47), "The Board's crucial finding negativing good faith was amply supported by the evidence: the 1964 campaign literature wherein the company itself identified refusal of checkoff with undermining this union's position; the 1961 action wherein the company granted the checkoff to the more favored local union; the lack of reliance on inconvenience or other business purpose; and the blanket refusal to consider alternatives—all in a context of vigorous anti-union animus."

withstanding that the employer had a good-faith desire to reach an overall agreement. The rationale for the holding is that such unilateral action is so incompatible with the duty to bargain collectively imposed by the Act that it is unlawful irrespective of the lack of subjective bad faith. Petitioner's action here was equally incompatible with the Act's bargaining requirements.

Thus, as the court below pointed out (Pet. App. 46), "Entering or conducting negotiations with the intent to destroy the other party would appear to be the archetypal example of a violation of the requirement that the parties must act in good faith." Since this was found to be petitioner's objective in refusing to agree to a dues checkoff clause, it may properly be held to have violated its duty to bargain collectively even though it was willing to, and did, enter into an agreement covering other subjects.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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